In The

Supreme Court of the United States

October Term, 1960

No.

Hyo T. Eun

Petitioner

v.

Frederick H. Mueller, Secretary of Commerce, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions	1
Jurisdiction	2
Question Involved	2
Statement of the Facts	2-3
Reasons for Granting the Writ	4
Conclusion	8

CASES CITED

Craft v. Davidson, 189 Ky. 378, 224 S.W. 1082	7
Greene v. McElroy et al, 360 U.S. 474, 3 L.Ed. 1377	5, 6, 8
Metsker v. Whitesell, 181 Ind. 126, 103 N.E. 1078	7
Nider v. Homan, 32 Cal. App. 2d 11, 20, 89 Pac. 2d 136	6-7
Sharkey v. Thurston, 268 N. Y. 123, 126, 196 N.E. 766, 767	6
State ex rel. Barnard v. Board of Education, 19 Wash. 9, 52 P. 317, 40 L.R.A. 317, 67 Am.St. Rep. 706	7
State v. Crane, 36 N.J.L. 394	7
State ex rel. La Crosse v. Averill, Tex. Civ. App. 110 SW 2d 1173	7
State ex rel. Miller v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470	7
Stockwell v. Township Board of White Lake, 22 Mich. 341	7

OTHER CITATIONS

Davis on Administrative Law, Par. 136, p. 435	7
Rep. Atty. Genl. Comm. AD Proc. 248-50, 1941	7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Hazel T. Ellis, by her counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on page 48.

OPINIONS BELOW

The United States District Court for the District of Columbia, Judge Matthews presiding, rendered a memorandum opinion which is shown on page 25 of the record. The opinion of the United States Court of Appeals for the District of Columbia is set forth on pages 46-47 of the appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 23, 1960, page 48 of the appendix. This petition is filed within ninety days from the date of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS INVOLVED

1. Whether a Chief of a Personnel Operation Division of the Department of Commerce who filed charges against the petitioner may act in the capacity of the accuser, prosecutor and judge of the charges against the petitioner.

2. Whether the petitioner may be separated from her governmental position upon charges made by a personnel officer who acted as accuser, prosecutor and judge and whether this was a denial of a fair hearing under the judicial ideas of fair procedure, particularly in the case where the personnel officer was not explicitly authorized to act in all such capacities.

3. Whether the petitioner was entitled to a fair hearing by an unbiased official prior to her removal as an governmental employee.

STATEMENT OF THE FACTS

The petitioner, Hazel T. Ellis, brought this action for a declaratory judgment and a mandatory injunction against Frederick H. Mueller then Acting Secretary of Commerce who was during the pendency of the action affirmed as such Secretary and the members of the United States Civil Service Commission to determine and fix her rights as a Civil Service employee of the United States and to restore her to her rightful position and grade in the governmental service from which she alleged that she was wrongfully discharged.

The petitioner was employed as an Economic Analyst, GS-11, with a salary of $7,465.00 per annum in the Department of Commerce. While so employed and on February 20, 1957 certain alleged and pretended charges were filed against her to the effect that she had stated to one Thomas R. Wilson, Special Assistant to the Assistant Secretary of Commerce for International Affairs that one Peters, an employee of the Department of Commerce had stated that "it would be a good thing if Egypt went Communist and if the Union of Soviet Socialist Republics could establish itself in a strong position in the Middle East." (R 18-19) On the basis of the statements to said Thomas R. Wilson and statements later which the petitioner made to the investigators, charges were filed against the petitioner. Charges were prepared and signed by one Catherine S. Lott, Chief of the Personnel Operations Division, Bureau of Foreign Commerce, Department of Commerce. Catherine S. Lott in her official capacity acted as accuser, prosecutor, judge and executioner. She removed the petitioner from her governmental position. (R 21-25) The petitioner being a Veterans Preference eligible appealed her discharge from her governmental position to the United States Civil Service Commission who rubber stamped the decision of Catherine S. Lott. [R 27-40-42-43]

The petitioner was discharged from her governmental position because she deemed it her patriotic duty to report an employee whom she believed to be disloyal to the Government of the United States.

In the District Court the respondents, then the defendants, filed a motion for summary judgment. The District Court rendered an opinion holding that there were no procedural errors and sustained the motion for summary judgment. [R 26] Upon appeal, the United States Court of Appeals for the District of Columbia without discussing any of the issues involved in the case, as was

brought out in the petitioner's brief in that Court, affirmed the judgment of the Court below. [A 46-47]

REASONS FOR GRANTING THE WRIT

The petitioner asserts that this application for a Writ of Certiorari is made in accordance with subdivision (b) of paragraph (1) of Rule 19 of this Court in that the United States Court of Appeals for the District of Columbia Circuit has decided an important question of Federal law in conflict with the applicable decisions of this Court and has so far departed from the accepted and usual course of judicial proceedings as to applicable decisions of this Court in administrative matters as to call for the exercise of this Court's power of supervision.

The ruling of the United States District Court for the District of Columbia and the affirmance of that judgment of the United States Court of Appeals for the District of Columbia holding that there were no procedural errors in removing the petitioner from her governmental position should shock the conscience of this Court.

The petitioner was removed by the same official, Catherine S. Lott, who acted in the capacity of accuser, prosecutor, judge and executioner and the decision of the Courts below opened the doorway for all public officials who wish to discharge any employee simply by the process of filing charges against them and adjudicating their own charges. Under this procedure which has now been fully sanctioned by the Courts below, any government employee can be summarily removed by any official who desires to file charges against them and who has power of removal. One could respect that such a decision could be made in the so-called totalitarian governments but not in the United States of America where it would seem that each person is entitled to a fair and proper hearing by an unbiased official. It is almost amazing that the two Courts

below approve the manner in which this petitioner was removed from her governmental position.

The question involved in this case is of great interest to all government employees now numbering over two million. Under the decisions below any personnel officer may file charges against an employee, and then adjudicate the charges and discharge the employee. The Courts below have approved this unjust and arbitrary procedure.

What a shocking situation this presents to all Americans who believe in the right of fair play. It is like a prosecuting attorney filing an information and later having been appointed Judge adjudicates the charges contained in the information against the defendant.

There is no authority found in the Federal Cases directly in point on this issue involved in this case. However this Court in its opinion in the case of Greene v. McElroy et al, 360 U.S. 474, 3 L. Ed.2d 1377 touched close to the point involved.

In that case a security clearance has been previously granted to William L. Greene, a private employee of a company handling Department of Defense contracts. This security clearance was revoked by the Department of Defense in which Greene had no opportunity to confront and cross examine either the persons whose statements reflected adversely on him or the Government investigators who took their statements. As a consequence of the loss of his security clearance he was discharged from his employment and unable to find other equivalent employment. Greene filed a complaint in the United States District Court for the District of Columbia, asking for a declaratory judgment that the revocation of his security clearance was unlawful and for an order restraining the responsible officials from acting pursuant to it.

The District Court granted a Government's motion for a summary judgment (150 F. Supp. 958) and the Court

of Appeals for the District of Columbia Circuit affirmed (103 U.S. App. D.C. 87, 254 F. 2d 944). This Court granted the application for a Writ of Certiorari. This Court held that the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference came within the "liberty" and "property" concepts of the Fifth Amendment.

This Court further held that it is an immutable principle of jurisprudence that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

This Court further held that it had been zealous to protect from erosion the rights of confrontation and cross-examination as expressed in the Sixth Amendment.

This Court further held judicial forms of fair procedure will not be restricted by implication and without the most explicit action by Congress, even in areas where it is possible that the Constitution presents no inhibition.

The petitioner strenuously submits that this Court's concern that the traditional forms of fair procedure should apply to the instant case where the petitioner was removed from her governmental position by charges filed by a personnel officer who acted in the capacity of accuser, prosecutor, judge and executioner, that the action which the personnel officer took violates the principle laid down by this Court in *Greene* v. *McElroy, et al.*, supra, because such procedure does not follow the traditional forms as required by this Court.

The state courts have rendered decisions on this point. In the case of *Sharkey* v. *Thurston*, 268 N.Y. 123, 126, 196 N.E. 766, 767 it was held that no man may be both a prosecutor and judge and in the case of *Nider* v.

Homan, 32 Cal. App. 2d 11, 20, 89 Pac. 2d 136 it was held that good ethics should not permit such a person to occupy both positions. Judge Groner, formerly Judge of the United States Circuit Court of Appeals for the District of Columbia in his views submitted with the report of the Attorney General's Committee objects to adjudication by an agency which has initiated and conducted the prosecution. Rep. Atty. Genl. Comm. AD Proc. 248-50, 1941. Davis on Administrative Law, Par. 136, p. 435.

All of the decisions of the States' highest Courts appear to hold that the accuser is disqualified from sitting on a trial board except where the Rule of Necessity does apply. The Rule of Necessity is a rule where there is no other person or official superior to the one who makes the accusations who may determine the issue. For example, where a police officer is removed by a Mayor of a city, there being no other official who had the right to file charges and no other officials to adjudicate the same, that situation calls for application of the Rule of Necessity. For the information of the Court as far as the state courts are concerned the rule that the accuser cannot sit as a Judge on the facts is reflected in the following decisions:

State ex rel. Barnard v. Board of Education, 19 Wash. 9, 52 P. 317, 40 L.R.A. 317, 67 Am. St. Rep. 706.

State ex rel. Miller v. Aldridge, 212 Ala. 660, 103 So. 835, 39 A.L.R. 1470.

State ex rel. La Crosse v. Averill, Tex. Civ. App. 110 SW 2d 1173.

Stockwell v. Township Board of White Lake, 22 Mich. 341.

Metsker v. Whitesell, 181 Ind. 126, 103 N. E. 1078.

Craft v. Davidson, 189 Ky. 378, 224 S. W. 1082.

State v. Crane, 36 N.J.L. 394.

Upon the basis of the decision of this Court in *Greene v. McElroy*, et al., supra, this important question of whether a public official can act as accuser, prosecutor, judge and executioner in dismissing a governmental employee should be adjudicated by this Court.

CONCLUSION

WHEREFORE, the petitioner prays that a Writ of Certiorari be granted to the United States Court of Appeals for the District of Columbia Circuit and that upon a hearing in this cause that the opinion and judgment of the said Court of Appeals be in all things reversed and this cause remanded to that Court proceed further in accordance with the opinion and judgment of this Court.

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APPENDIX

(Filed June 23, 1960—Joseph W. Stewart, Clerk)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,599

HAZEL T. ELLIS, APPELLANT

v.

FREDERICK H. MUELLER, Acting Secretary of Commerce, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

---

Decided June 23, 1960

Mr. Claude L. Dawson for appellant.

Mr. Anthony F. Cafferky, Attorney, Department of Justice, with whom *Mr. Kevin T. Maroney*, Attorney, Department of Justice, was on the brief, for appellees.

Before WASHINGTON, DANAHER and BASTIAN, Circuit Judges.

PER CURIAM: This is a civil service case, in which plaintiff-appellant's dismissal was the subject of an extensive hearing before the Civil Service Commission under the Veterans' Preference Act of 1944, 5 U.S.C. § 863 (1958), and was upheld by that body. Suit for a declaratory judgment and restoration of status was thereafter brought in the District Court. That court granted the appellees' (defendants') motion for summary judgment.

The function of the courts in cases like this is not to review the merits of a dismissal, but to determine whether the employee was accorded his statutory and procedural rights. See *Hargett* v. *Summerfield*, 100 U.S. App.D.C. 85, 243 F.2d 29 (1957). Such rights were fully accorded here.

Affirmed.

(Filed June 23, 1960—Joseph W. Stewart, Clerk)

* * * * *

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Curiam.

Dated: June 23, 1960

(Filed August 4, 1960—Joseph W. Stewart, Clerk)

* * * *

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled case and include therein the following:

1. Joint Appendix
2. Opinion
3. Judgment
4. Designation of Record
5. Clerk's Certificate

s Claude L. Dawson
Claude L. Dawson, Attorney for the Appellant, 1049 Shoreham Building, Washington 5, D. C.

Certificate of Service

I, Claude L. Dawson, attorney for the above-named appellant in the above-entitled cause, hereby certify that service of the within and foregoing designation of record in the above entitled case was made by enclosing a true copy thereof in an envelope addressed to the Attorney for the Appellees, Mr. Anthony F. Cafferky, Department of Justice, Washington, D. C., postage prepaid, and depositing said envelope in the United States mails at Washington, D. C. on August 1st, 1960.

s Claude L. Dawson
Claude L. Dawson
Attorney for the Appellant.

* * * *

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, hereby certify that the foregoing pages numbered from 1 to 49, both inclusive, constitute a true copy of the joint appendix to the briefs, and of the papers and pleadings designated by counsel for appellant in the foregoing designation of record filed in the case of:

Hazel T. Ellis, Appellant,

v.

Frederick H. Mueller, Acting Secretary of Commerce, et al., Appellees

No. 15,599 September Term, 1959, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this fourth day of August, A. D. 1960.

JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit.

[SEAL] BY: s William G. Secrest
William G. Secrest
Deputy Clerk.

FILE COPY

FILED
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JAMES R. BROWNING, Clerk

No. 380

In the Supreme Court of the United States

OCTOBER TERM, 1960

HAZEL T. ELLIS, PETITIONER

v.

FREDERICK H. MUELLER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes, regulations, and orders involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:	
Cole v. *Young*, 351 U.S. 536	7
Greene v. *McElroy*, 360 U.S. 474	3
Metsker v. *Whitesell*, 103 N.E. 1078	8
State ex rel. Miller v. *Aldridge*, 103 So. 835, 39 A.L.R. 1470	8
Stockwell v. *Township Board of White Lake*, 22 Mich. 341	8
Statutes, regulations and orders:	
Veterans' Preference Act of 1944, Section 14, 5 U.S.C. 863	2, 5, 8, 9
Civil Service Commission Regulations:	
5 C.F.R. 22.201-22.205	3
5 C.F.R. 22.301-22.607	7
5 C.F.R. 22.401	5
5 C.F.R. 22.501-22.607	3
Department of Commerce Orders:	
Order No. 4 (amended), dated May 9, 1956	3
Order No. 202-1 (amended), dated Oct. 23, 1956	3

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 380

HAZEL T. ELLIS, PETITIONER

v.

FREDERICK H. MUELLER, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 9) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 10) was entered on June 23, 1960. The petition for a writ of certiorari was filed on September 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the action of the authorized administrative officer within the Department of Commerce, in preferring agency charges (based on a departmental investigation) against an employee of that Department and subsequently deciding whether the employee's reply is satisfactory, violates the provisions of the Veterans' Preference Act of 1944, or the Civil Service Commission regulations.

STATUTES, REGULATIONS, AND ORDERS INVOLVED

The Veterans' Preference Act of 1944, 5 U.S.C. 863, reads in pertinent part as follows (as it appears in the United States Code):

> § 863 Discharge, suspension, etc., only for cause; reason in writing; advance notice; personal appearance; findings and recommendations.
>
> No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * *, stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision; Provided, That

> such preference eligible shall have the right to make a personal appearance * * * in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission * * *.[1]

The pertinent provisions of Department of Commerce Administrative Order No. 4 (amended), dated May 9, 1956 (Subject—Office of Personnel Management), and Order No. 202-1 (amended), dated October 23, 1956 (Subject—Delegation of Authority for Personnel Management), are printed in the Joint Appendix (drawn up in the court below and filed here) at pp. 41 and 44, respectively.

STATEMENT

At the time of her dismissal in March 1957, the petitioner was employed by the Department of Commerce as an Economic Analyst in the Bureau of Foreign Commerce. Prior thereto, on December 7, 1956, she had related to Thomas R. Wilson, Special Assistant to the Assistant Secretary of Commerce, certain statements which she attributed to Thomas H. Peters, her immediate supervisor (R. 18-19). Pending a complete investigation of the truth or falsity of these alleged remarks, Peters' departure for a foreign service assignment was postponed from December 7, 1956, to January 14, 1957 (R. 18-19). In the interim, an

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[1] Civil Service Commission regulations providing for notice, opportunity to reply, notification of adverse agency action, and right to a Commission hearing, are set forth in 5 C.F.R. 22.201-22.205. Commission regulations providing for a hearing, introduction of evidence, attendance and examination of witnesses, etc. and Commission appellate proceedings are found in 5 C.F.R. 22.501-22.607.

investigation was conducted at the direction of Joseph M. Kelly, Deputy Security Control Officer, Department of Commerce, by departmental investigators (R. 16-17). During this inquiry, petitioner and other departmental employees were interviewed in an effort to fully develop the facts and circumstances surrounding the statements allegedly made by Peters (R. 17). During petitioner's interview she related to the investigators many additional remarks which she similarly attributed to Peters. In each instance these (as well as the accusations which triggered the investigation) were of such a nature, that, if in fact they had been made by Peters, serious questions of his loyalty, as well as his suitability for continued public service, would arise.[2]

Upon conclusion of this investigation and consideration of the results, it was determined that the petitioner's accusations were either false or unwarranted, and consequently on February 20, 1957, a statement of charges was served upon her, signed by Mrs. Catherine S. Lott, Chief of the Personnel Operations Division, Department of Commerce, notifying peti-

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[2] For example, petitioner told Wilson on December 7, 1956, that Peters had stated "it 'would be a good thing' if Egypt went Communist and if the Union of Soviet Socialist Republics could establish itself in a strong position in the Middle East" and on January 3, 1957, petitioner informed Commerce Department investigators that Peters had stated, *inter alia*, that President "Nasser should use his influence to persuade all the countries in that geographic vicinity, such as Iraq, Syria, Iran, etc., to blow up all the Western oil pipe lines in retaliation against the British invasion of the Suez area" (R. 18-19). At this time Peters' temporarily suspended assignment was in Cairo, Egypt.

tioner that the Department proposed to remove her from the service (R. 18-20). This notice informed her specifically of the statements found to be false or unwarranted and of her right to reply personally and in writing to these charges and to submit affidavits in support of her reply.

On February 27, 1957, petitioner requested and was granted an extension of time to respond and on March 15, 1957, she replied and, *inter alia*, entered a general denial to the falsity of the statements made by her (R. 21-25).

After consideration of petitioner's reply, she was notified by letter from Mrs. Lott, dated March 22, 1957, that since she had not demonstrated either that she had not made these statements concerning Peters, or, if she had, that they were true, her reply was unsatisfactory and accordingly she would be dismissed effective March 29, 1957 (R. 21-25). This notice additionally informed petitioner of her right to appeal this decision to a designated official within the Department of Commerce or, as one entitled to veterans' preference, to the Civil Service Commission under the Veterans' Preference Act of 1944 (Section 14, 5 U.S.C. 863).

On March 27, 1957, petitioner pursued her appeal directly to the Civil Service Commission. After an independent investigation by the Commission,[3] the complete results of which were available to both parties, hearings commenced on petitioner's appeal on June 11, 1957, and continued intermittently until

[3] See 5 C.F.R. 22.401.

July 3, 1957 (R. 27). On November 21, 1958, after considering the entire record, the Commission's Appeals Examining Office concluded that, on the evidence, it appeared that petitioner had a motive to injure Peters and, secondly, that he had not made the statements attributed to him by the petitioner (R. 39). Consequently, her discharge by the Department of Commerce was upheld (R. 27-40). This decision was sustained by the Commission's Board of Appeals and Review on June 8, 1959 (R. 42-43).

Petitioner's complaint was filed in the district court on August 7, 1959 (R. 1), and respondents' answer on October 7, 1959 (R. 10). On December 12, 1959, the district court granted summary judgment for respondents, dismissing the complaint, and observing in a memorandum opinion (R. 25):

> The limited judicial review permissible to this Court does not embrace an inquiry into the truth or falsity of the charges on which the plaintiff as an executive employee was removed by an executive official.
>
> The record indicates that no procedural rights of the plaintiff have been denied. This being so, the function of the Court is exhausted. * * *

On June 23, 1960, the court of appeals affirmed the district court's disposition of the case, similarly finding that petitioner had been accorded all procedural rights due her (Pet. 9-10).

ARGUMENT

The sole contention raised by the petition is that the petitioner was unfairly and improperly removed

from her position as a government employee because Mrs. Lott, the administrative officer who formally filed the letter of charges (based on a Commerce Department investigation), also decided that the petitioner's answer to the charges, in the light of all the circumstances, warranted her dismissal from government service. The argument is not only without merit, but it completely ignores the fact that, following petitioner's dismissal by the Department of Commerce, she received a hearing, as a veterans' preference eligible, before the Civil Service Commission,[3] at which witnesses were cross-examined by her.[4]

Petitioner's procedural rights, as a veterans' preference eligible, were governed by the Veterans' Preference Act of 1944. *Cole* v. *Young*, 351 U.S. 536. That statute and the regulations under it require that a specific written statement of charges be served and that the employee affected be allowed a reasonable opportunity to submit a full and complete reply personally as well as in writing. They do not require that the employee be afforded judicial or quasi-judicial proceedings within the agency prior to dismissal.

The principle advanced by petitioner, that the due process clause of the Fifth Amendment demands a rigid separation of prosecuting and adjudicatory functions, does not apply to procedures for removal

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[3] Mrs. Lott, of course, took no part in the proceedings before the Civil Service Commission.

[4] In accord with procedures established and set forth at 5 C.F.R. 22.301-22.607.

of federal employees. This is attested by the long history of such procedures, as well as by the accepted practice (within the agencies) under the Lloyd-La Follette and Veterans' Preference Acts. The authorities cited by petitioner are not opposed to this position. In each instance in which the court in those cases found a lack of fair procedure it did so where the power being exercised was essentially judicial and the proceedings were clearly of a quasi-judicial nature, not purely executive as here. In *Stockwell* v. *Township Board of White Lake*, 22 Mich. 341, 345 (Pet. 7), the court stated that this principle asserts itself "whereever *judicial* powers are employed by a body appointed by law" (emphasis added). Cf. *Metsker* v. *Whitesell*, 103 N.E. 1078; *State ex rel. Miller* v. *Aldridge*, 103 So. 835, 39 A.L.R. 1470. In the remaining authorities cited by petitioner, the court found a lack of fair procedure due to bias, prejudice, or personal interest. Such cases have no application here for, as the record indicates, Mrs. Lott's participation in the agency proceedings was completely impersonal and in fact she had no official knowledge of the matter until the investigation had been completed and the results turned over to her, as the authorized personnel officer, for evaluation.

Petitioner's reliance on *Greene* v. *McElroy*, 360 U.S. 474, is similarly misplaced. There this Court found that the Department of Defense had not been authorized to create an industrial security clearance program under which the procedural safeguards of confrontation and cross-examination were denied Greene during his hearing. Here, no such question

is presented, for the statute and regulations prescribing petitioner's rights are explicit and do not provide for such proceedings within the agency. However, the record is clear that in her subsequent hearing before the Civil Service Commission petitioner was afforded and made extensive use of these "traditional safeguards".

In sum, it is plain that the procedures employed by the Department of Commerce in effecting petitioner's dismissal were in accordance with her rights under the Veterans' Preference Act of 1944 and the applicable Civil Service Commission regulations. The decision of the court of appeals was clearly correct and does not call for further review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1960.

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